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Nos. 82-1860 and 82-1862

In The

Supreme Court of the United States

October Term, 1983

SCHNEIDER MOVING & STORAGE COMPANY,
Petitioner,

and

PROSSER'S MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States, Southeast and Southwest Areas Pension Fund, a pension trust,
Respondents.

and

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States, Southeast and Southwest Areas Health and Welfare Fund, a health and welfare trust,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER SCHNEIDER MOVING AND STORAGE COMPANY'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

May trustees of multiemployer health and welfare and pension funds, which are created and receive contributions as third-party beneficiaries of collective bargaining agreements between employers and labor unions under Section 302 (c) of the Taft-Hartley Act (29 U. S. C. § 186 (c)), bypass the union and the contractual grievance and arbitration procedure by suing an employer for allegedly delinquent contributions directly in federal court, where the determination of liability requires the interpretation and construction of the collective bargaining agreement in order to resolve issues relating to which employees are covered by the employer's obligation to contribute?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER SCHNEIDER MOVING AND STORAGE COMPANY'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 700 F. 2d 433 (8th Cir. *en banc* 1983) and is set forth in the Appendix to Schneider's Petition for Writ at A-20. The opinion of a

panel of the Court of Appeals for the Eighth Circuit was withdrawn when the request for a rehearing *en banc* was granted. The slip opinion is set forth in the Appendix to Schneider's Petition for Writ at A-7. The Memorandum and Order of the District Court for the Eastern District of Missouri was unreported and is reproduced in the Appendix to Schneider's Petition for Writ at A-1 to A-6.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit, *en banc,* was entered on February 16, 1983. The Petition for Certiorari was timely filed with this Court on May 17, 1983. On October 3, 1983, the Petition for Certiorari was granted. A Petition for Certiorari filed in the case of *Prosser's Moving and Storage Company v. Robbins, et al.,* No. 82-1862, was also granted on October 3, 1983, and the two cases were consolidated. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

This case involves §§ 9 and 302(c) (5) of the Labor-Management Relations Act (29 U. S. C. §§ 159 and 186(c) (5) (1976)) and §§ 404(a) and 515 of the Employee Retirement Income Security Act of 1974 (29 U. S. C. §§ 1104 (a) and 1145). These statutory provisions are set forth in Appendix A to this Brief on the Merits.

STATEMENT OF THE CASE

A. Collective Bargaining and Multiemployer Funds

The Respondents are Trustees of two multiemployer employee benefit funds—a health and welfare fund and

a pension fund[1]—which receive contributions solely from employers. No employees contribute. The amount of the employers' contributions is determined by agreement reached through collective bargaining. Employers, such as Petitioner Schneider, contract with Teamsters local unions representing their employees to contribute to the funds a specified number of dollars per unit of employee labor covered by the collective bargaining agreement. The collective bargaining agreements usually provide no particular level of benefits. Benefits are determined solely by the trustees of the pension or health and welfare fund, as the case may be. The Respondents' trust agreement expressly bars any employer involvement in the administration of the fund, other than as a contributor. Further, there is no direct correlation between the level of contributions established by a collective bargaining agreement on the one hand, and, on the other, the level of benefits set by the Respondents as trustees of the funds.

The level at which, and the categories of work for which, a particular employer contributes to the funds for its covered employees is established by collective bargaining between the employer and the Teamsters local union representing those employees. *See,* Schneider Pet. App. A-43. The trustees have no direct control over the dollar level of contributions established. Similarly, the employer has no control over what benefits the fund and its trustees may establish, and the rules under which those benefits accrue to any employee fund beneficiaries. All of these matters are determined solely by the trustees.

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[1]Central States, Southeast, and Southwest Areas Health and Welfare Fund and Central States, Southeast, and Southwest Areas Pension Fund.

B. The Allegations in This Case

This matter involves a suit filed on April 21, 1980, by the Respondents as Trustees of the Central States Health and Welfare Fund and as Trustees of the Central States Pension Fund (hereinafter collectively referred to as either "Trustees" or "Funds"), against the Petitioner, Schneider Moving & Storage Company (hereinafter "Schneider"), in the United States District Court for the Eastern District of Missouri.

The complaint alleged that:

(1) Schneider had been a party to a series of three collective bargaining agreements from 1970 to 1979, with Teamsters Local 610, (J. A. 6, para. 6, 7 and 8);

(2) Each of the agreements was the "Master Agreement for Public Movers of the Greater St. Louis and St. Louis County areas of Missouri," (J. A. 6, para. 6, 7, and 8);

(3) The agreements provided for "specific payments to the Health and Welfare Fund *for each employee covered by said Agreement,*" (emphasis added) (J. A. 6 para. 6, 7 and 8);

(4) "By virtue of provisions contained in the Collective Bargaining Agreements to which Defendant was bound, Defendant did promise and become obligated to make contributions, *in amounts set forth therein,* to said Pension and Health and Welfare Funds on behalf of its employees for each hour worked or for which wages were received by such employees," (emphasis added) (J. A. 7, para. 10);

(5) The failure to make the contributions as required constituted a violation of the collective bargaining agreements, (J. A. 8, para. 8);

(6) Under the terms of the collective bargaining agreements and the Trust Agreements the Trustees were authorized to audit Schneider's payroll records

to determine compliance with the obligation to contribute "as required under the applicable Collective Bargaining Agreement," (J. A. 8-9; para. 11);

(7) Schneider had refused to permit the Trustees to audit and had failed to make the required payments, (J. A. 9; para. 12); and[2]

(8) As a result of such alleged "omissions and breaches of Agreement" the Trustees might have "to deny the employee-beneficiaries of such fund, for whom required contributions have not been made, the benefits provided thereunder. . . .," (J. A. 9; para. 13);

The Trustees prayed, *inter alia,*

"1. That an account be taken as to *all employees* of Defendant *covered by the Collective Bargaining Agreement,* as to wages received and hours worked by such employees to determine amounts required to be paid to the Trustees . . . covering the periods for which the collective bargaining agreements are effective," (emphasis added) (J. A. 10); and

2. That Schneider be ordered to pay to the Trustees all amounts due. (J. A. 10-11).

C. The Exhibits to the Complaint

Attached to the Trustees' Complaint were the following exhibits which were incorporated by reference.

Exhibit 1—Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County Areas of Missouri for the period March 1, 1970, through February 20, 1973, with Local Union No. 610.

Exhibit 2—Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County Areas of Missouri for the period

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[2]As the Court below noted, Schneider had consented to an audit and did not raise the issue of the right to audit. The only issue raised by Schneider relates to how the coverage issue is to be handled. 700 F. 2d 433, 436; (Schneider Pet. App. A-22).

March 1, 1973, through February 28, 1976, with Local Union No. 610.

Exhibit 3—Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County Areas of Missouri for the period March 1, 1976, through February 28, 1979, with Local Union No. 610. (Schneider Pet. App. A-43).

Exhibit 4—Pension Trust Agreement. (J. A. 14)

Exhibit 5—Pension Plan

Exhibit 6—Health and Welfare Trust Agreement

Exhibit 7—Joint Application

Exhibit 8—Participation Agreement

D. The Collective Bargaining Agreements

Exhibit 3, the Master Agreement for Public Movers of the Greater Metropolitan St. Louis and St. Louis County Areas of Missouri for the period March 1, 1976, through February 28, 1979, is set forth in full in Schneider's Petition (Schneider Pet. App. A-43-76) and is also representative of the 1970-73 and 73-76 collective bargaining agreements (Complaint Exhibits 1 and 2), except as indicated below with respect to Section 12.2. (*See,* J. A. 12-14.)

The three collective bargaining agreements categorized employees covered by the agreements on the basis of their tenure. They are referred to as either "regular" or something else, i. e., extras, temporary, part-time, casuals, and seasonal. Employees are further classified for purposes of benefit entitlement based upon their length of time within a particular tenure class. The collective bargaining agreements provide different benefits for employees depending on their tenure status. Appendix B summar-

izes the categorization of different groups of employees depending on the status of their tenure.

E. The Plan Documents

As stated above, the Trustees attached several plan documents to their complaint, including the Pension Trust Agreement, excerpts of which are included in the Joint Appendix. (J. A. 14-33.) The other documents were omitted from the Joint Appendix. The allegations in the Complaint relating to those exhibits are that those documents, along with the collective bargaining agreements provide:

> (1) That the "Trustees . . . are required to receive, hold and manage all monies required to be contributed to the [Fund] in accordance with the provisions of the then applicable Collective Bargaining Agreement, as a Trust Fund, for the uses and purposes set forth in the Agreement and Pension Trust Agreement and Welfare Trust Agreements governing the Fund to which the contributions are made," (J. A. 7; para. 9); and
>
> (2) That the Trustees have the right to audit. (J.A. 8; para. 11).

F. The Proceedings Below

Petitioner Schneider answered the Complaint on June 5, 1980. (J. A. 34-37). On October 20, 1980, Schneider moved to dismiss the Complaint on the grounds that the claims involved underlying issues of coverage[3] which had

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[3]Here the issue is framed by reference to which employees are covered by Schneider's obligation to contribute, based on their categorization by tenure as "regular" or something else. Obviously the issue could also arise where employees are covered or not covered by job classification. The issue of coverage also arises when an employer has contracts with unions which have overlapping jurisdiction, such as is typical in the construction industry, and different fringe benefit funds claim the employer was obligated to make contributions on behalf of the same employees.

to be raised and resolved through the grievance and arbitration procedure set forth in Article VI of the collective bargaining agreements attached to the Complaint as Exhibits 1, 2, and 3. (Schneider Pet. App. A-43, at A-51-53). In support of the Motion to Dismiss Schneider offered the affidavit of Marvin Schneider, Vice-President of Petitioner. (J. A. 38). In his affidavit M. Schneider states that Schneider employs two types of non-supervisory employees—regulars and extras; that only regulars have ever been considered entitled under the collective bargaining agreements to fringe benefits such as seniority, holidays, vacations, and other benefits; that such is typical of the industry; and that an audit by the Trustees had resulted in claimed deficiencies to the Welfare Fund of $12,303.50 and to the Pension Fund of $12,610.50; and that the largest part of the alleged deficiencies was for "extras." Amounts were also claimed for employees Schneider believed to be supervisory or otherwise excluded from the bargaining unit. (J. A. 38-40). The Trustees offered no counter-affidavits or evidence.

On November 7, 1980, the Honorable John K. Regan, United States District Judge for the Eastern District of Missouri, dismissed the Complaint. Judge Regan, relying on the then recent decision of the Court of Appeals for the Seventh Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F. 2d 171 (7th Cir. 1980), ruled that this was ***not a simple collection*** case, but instead that Schneider's ultimate liability depended upon a construction and interpretation of the collective bargaining agreement. Judge Regan accordingly held that such controveries must first be submitted to arbitration. (Schneider Pet. App. A-1-6).

The Trustees appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit. On March 24, 1982, the Court of Appeals reversed the decision of the District Court and remanded the case for further proceedings. (Schneider Pet. App. A-7 and Prosser's Pet. App. A-27).

On April 7, 1982, Schneider and Prosser each filed separate Petitions for Rehearing *en banc* in the United States Court of Appeals for the Eighth Circuit. The Court of Appeals granted both Schneider's and Prosser's Petition for Rehearing *en banc.* (Prosser's Pet. App. A-26).

On February 16, 1983, in a six to two decision, the Eighth Circuit Court of Appeals, while noting a conflict among the Circuit Courts of Appeals, reversed the District Court and overruled several prior decisions of the Eighth Circuit and remanded the case for further proceedings. 700 F. 2d 433; (Schneider Pet. App. A-21 and Prosser's Pet. App. A-1). The Court *en banc,* in an opinion by Judge Arnold, joined by Lay, Chief Judge, Heaney, Bright, Ross and McMilliam, ruled that national pension policy dictates that "these trustees are not bound by the arbitration procedure, which they have no right to initiate." 700 F. 2d 433, 435; (Schneider Pet. App. A-21-22). The Court below further concluded that under *Lewis v. Benedict Coal Corporation,* 361 U. S. 459 (1960), the Trustees are not subject to the arbitration procedure as third party beneficiaries. 700 F. 2d 433, 436; (Schneider Pet. App. A-24-25). Further, the Court held that the national labor policy favoring arbitration of collective bargaining disputes must give way to the right of trustees to administer Taft-Hartley funds free of union interference and

this requires that they have a direct right of access to the courts. 700 F. 2d 433, 439-442; (Schneider Pet. App. A-29-37).

Senior Circuit Judge Henley, joined by Circuit Judge John R. Gibson, dissented, stating:

> Today the court makes bad law. (footnote omitted). It unnecessarily overrules three prior decisions of this court, rejects the reasoning of the Seventh Circuit in *Martin* and erodes pronouncements of the Supreme Court in the *Steelworkers Trilogy*. Its decision may be perceived as doing disservice to the national policies of maintaining industrial peace, avoiding delay and deferring to the expertise of persons acquainted with industry standards and the law of the shop.

700 F. 2d 433, 443; (Schneider Pet. App. A-38-39).

SUMMARY OF ARGUMENT

Congress and this Court have emphatically declared that it shall be the federal labor policy to encourage collective bargaining, including the use of contractual arbitration procedures to resolve disputes over the construction, interpretation and application of collective bargaining agreements, and that trustees of Taft-Hartley multiemployer employee benefit trust funds shall discharge their fiduciary duties independently of the unions and employers that appoint them and for the exclusive benefit of the participants and beneficiaries of the trusts. In this case the Trustees of the Central States and Southeast and Southwest Areas Pension Fund and Health and

Welfare Fund have filed an action in federal district court alleging that Schneider had failed to make contributions to the Funds on account of the employment of certain employees as agreed in a series of collective bargaining agreements. An examination of the collective bargaining agreements reveals that Schneider and the union had, pursuant to the performance of the bargaining obligation, lawfully intended to provide for contributions on account of employment of only certain classes of employees, excluding others. However, due to patent ambiguities in the wording of the contracts, a question exists as to which employees are covered by the obligation to contribute and which are not.

Federal labor policy requires that coverage issues be raised and resolved under the procedures provided by the collective bargaining agreement as a condition precedent to the Trustees claiming that they have a right to receive contributions for the employees in question. The resolution of coverage issues does not involve trust administration under Section 302(c)(5) of the Labor Management Relations Act or under Section 404(a) of ERISA. Therefore, the Trustees have no obligation to resolve coverage issues outside the provisions of the collective bargaining agreement.

The position asserted by the Trustees seriously erodes the federal policy of encouraging collective bargaining and the resolution of disputes through the arbitration procedure which was agreed to under the collective bargaining agreement, and also jeopardizes the federal policy of trustee independence in the administration of such funds.

Further, because the funds are third party beneficiaries of the collective bargaining relationship, their rights can be no greater than those which are determined in accordance with the collective bargaining process. The Trustees must await a determination reached through that process. If resolution of disputes through a grievance and arbitration procedure is part of that process, then the Trustees must await the outcome of that procedure. While the outcome of that procedure may or may not concur with the Trustees' position on coverage, they are bound by the outcome just as they, the union, and Schneider, are bound by the terms of the collective bargaining agreement which establishes the rights of the Trustees to receive contributions.

A decision by the union not to pursue the coverage issue through the contractual grievance and arbitration procedure should be judged by the standard applicable to the duty of fair representation. It is under that standard that the contribution obligation is negotiated in the first instance. This would adequately assure that the union will be reasonably diligent in investigating and resolving the coverage issue.

The requirement that coverage issues be resolved through the contractually agreed upon grievance and arbitration procedure has support in the sound reasoning of the Courts of Appeals for the Fourth, Sixth, Seventh, and Ninth Circuits, and in rulings of panels of the Eighth Circuit Court of Appeals which preceded the ruling of the Court below.

———o———

ARGUMENT

I. Two important federal labor policies require that issues as to which employees are covered by an employer's obligation under a collective bargaining agreement to contribute to Taft-Hartley Act multiemployer employee benefit funds and which involve the construction and interpretation of the terms of the agreement, must be raised and resolved through the grievance and arbitration procedure of the agreement.

The Court below viewed this case as involving an apparent conflict between two federal policies:

> 1. Collective bargaining, including use of collectively bargained for arbitration procedures to resolve disputes over the construction and interpretation of collective bargaining agreements, is to be encouraged; and
>
> 2. Trustees shall be independent of union and employer influence in the administration of Taft-Hartley multiemployer employee benefit trust funds.

700 F. 2d 433, 437; (Schneider Pet. App. A-25-26).

This apparent conflict is imaginary. Both policies can be, and should be, stressed. These policies do not exist in a vacuum. Each is a function of the other. The position being asserted by Schneider allows for the harmonious accommodation of both of these policies; the position being asserted by the Trustees and which was adopted by the Court below, threatens to erode not one, but both of these policies, and is incompatible with the rationales underlying those policies.

A. Collective bargaining, including the use of contractual arbitration procedures to resolve disputes over construction, interpretation, and application of agreements, is to be encouraged.

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, *for the purpose of negotiating the terms and conditions* of their employment or other mutual aid or protection. (emphasis added).

Wagner Act, 29 U. S. C. § 151 (1976).

Arbitration pursuant to contractually agreed upon procedures is favored as the means of resolving labor disputes.[4]

The Trustees argued in the courts below that this policy has no application to them or disputes of this type because:

> (1) Coverage issues are not the types of disputes that are suitable for resolution under the contractual grievance and arbitration procedure;
>
> (2) The Trustees are not parties to the collective bargaining agreement;
>
> (3) The Trustees' fiduciary duties would be compromised by having to depend on the union to enforce their perceived rights; and
>
> (4) The Trustees cannot be forced to arbitrate issues of trust administration—which is how they characterize the collection of alleged delinquencies.

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[4] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Gateway Coal Co. v. U.M.W.*, 414 U.S. 368 (1974). *See also, Collyer Insulated Wire*, 192 NLRB 837 (1971); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

The position of the Trustees and the opinion of the Court below substantially undermines the status of a local union as the statutory exclusive bargaining representative of an employer's employees. *National Labor Relations Act* § 9(a), 29 U. S. C. § 159(a) (1976). This status as exclusive representative is a fundamental tenet and central element of the Congressional structuring of industrial relations in this country. *Abood v. Detroit Board of Education,* 431 U. S. 209, 220 (1977). The status of exclusive representative is presumed to be the basis of a union's underlying strength. *Id.*

As the exclusive collective bargaining representative, the local union engages in negotiations with employers such as Schneider which lead to agreements which are reduced to writing. *NLRA,* § 8(d), 29 U. S. C. § 158(d) (1976).

The National Labor Relations Act defines the obligation to bargain as including the conferring "in good faith with respect to wages, hours, and other conditions of employment, or the negotiation of an agreement or any question arising thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." *NLRA,* §§ 8(a) (5), (b) (3) and (d); 29 U. S. C. §§ 158(a) (5), 158(b) (3), and 158(d). The NLRA has been interpreted to require the employer to bargain with the union regarding pension plans and health and welfare plans. *Inland Steel Co. v. NLRB,* 170 F. 2d 247 (7th Cir. 1948); *cert. den.* 336 U. S. 960 (1949); *W. W. Cross & Co. v. NLRB,* 174 F. 2d 875 (1st Cir. 1949); *See also, Sheet Metal Workers (Central Florida Sheet Metal Contractors Association, Inc.),* 234 NLRB 1238 (1978). In fact, the National Labor Relations Board is of the opinion that even during the term of a

collective bargaining agreement, the subject of who is covered by an obligation to make contributions to a multi-employer employee benefit fund is a mandatory subject of bargaining. *International Union of Operating Engineers, Local Union No. 12 (Maas & Feduska, Inc.)*, 234 NLRB 1256 (1978), *rev'd sub nom. Maas & Feduska, Inc. v. NLRB*, 632 F. 2d 714 (9th Cir. 1979).

Maas & Feduska reflects an attitude that since it is their members who are the participants in and beneficiaries of the benefit funds, it is the duty of local unions, as the collective bargaining representative, to protect the funds from employers who fail to make contractually agreed-upon contributions.

While representing the employees of an employer in collective bargaining, a union has full freedom to bargain to the greatest good of the greatest number. Consequently, individual interests are at times subordinated to the interests of the group. It is uniformly recognized that the union must be afforded a broad range of discretion to resolve conflicts of interest within its ranks. *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953).[5] *See* Comment,

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[5]In *Huffman*, the Court upheld the validity of an agreement between Ford Motor Company and the UAW which afforded seniority credit for military service to veterans who had not worked for the company prior to their military service in World War II. The court explained:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed as statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose and the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U. S. 330, 338 (1953).

The Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent, Arbitrary, or Perfunctory Grievance Administration, 46 Mo. L. Rev. 142 (1981).

The union is of course obligated to discharge its responsibility as the exclusive bargaining representative fairly and in good faith. *Vaca v. Sipes,* 386 U. S. 171 (1967).

To allow the trustees of funds to attempt to override what a union and employer have agreed upon as a mutual accommodation of each other's desires and needs—and with due consideration to the ultimate threat of a strike or lockout—would be to seriously erode the entire concept of collective bargaining.

The Court below was fearful that if the coverage issue was left in the hands of the union, some unspecified obligations of the Trustees would be compromised:

> The union may be inclined to trade off a potential pension fund claim against some other bone of contention in its relations with the employer. Any such decision may be completely legitimate.

700 F. 2d 433, 442; (Schneider Pet. App. at A-36).

This expressed fear completely ignores the effect of the legitimate process of collective bargaining. This process has recently been approved by this Court in *United Mine Workers of America Health and Retirement Funds v. Robinson,* 455 U. S. 562 (1982). *Robinson* is directly on point because it involved a question of whether the negotiation and allocation of benefits in a collective bargaining agreement (as distinguished

from negotiation of contribution obligations) were subject to a standard of reasonableness under § 302(c)(5). Here the Court is concerned with a collective bargaining agreement between Schneider and the Trustees which provides that Schneider will make contributions to the Funds on account of the work performed by certain employees and not on account of the work performed by other employees, depending upon the tenure of those employees, i.e., whether they are regular, part-time, casual, extra, etc. (*See,* Appendix B.) By thus having rejected the contention that there is an implied standard of reasonableness under § 302(c)(5), this Court lends support to the rationale that the agreement between Schneider and the union regarding the classes of employees for which Schneider would make contributions ought to be honored. Now, however, the Trustees have raised a question as to whether Schneider has made contributions on account of certain employees as agreed. Apparently the union does not agree with the Trustees or, at least, it has not yet raised the issue. Thus, Schneider and the union seem to be in agreement. Nevertheless, notwithstanding that apparent agreement, the Trustees now assert that they have the right to ask a federal court to upset the agreement between Schneider and the union, to ignore the intent of the parties, and to ignore the procedure Schneider and the union agreed upon for resolving such disputes.[6] This Court has said that this is not the role of the federal courts.

> There is no general requirement that the complex schedule of the various employee benefits [within the

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[6]The union was not joined as either a party plaintiff or defendant in the proceedings below.

> collective bargaining agreement] must withstand judicial review under an undefined standard of reasonableness.
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> [W]hen neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract.

U.M.W.A. Health and Retirement Funds v. Robinson, 455 U.S. 562, 575-6.

The Court below also worried that the union would not diligently pursue resolution of the coverage issue at the request of the Trustees. 700 F.2d 433, 441-2; (Schneider Pet. App. A-35-37). It is respectfully submitted that should the Trustees encounter resistance on the part of the local union to process the coverage issue under the collective bargaining agreement, the Trustees would have an action similar to an individual employee's action for breach of the duty of fair representation. *See, Smith v. Evening News Association,* 371 U.S. 195 (1962), where the Court provided this procedural vehicle for the individual employee to obtain redress if his union fails to represent him fairly.

Later, in *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965), the Court ruled that before an employee may file a suit for breach of the duty of fair representation, the employee must exhaust the contractual grievance procedures through the union. If individual employees fail to take advantage of the grievance and arbitration procedure, they will not be permitted to bring an action in court, unless the contract specifically states that its procedures are not the sole means of remedying grievances. As Mr. Justice Harlan observed for the Court: "It cannot be said, in the normal situation, that contract griev-

ance procedures are inadequate to protect the interest of an aggrieved employee until the employee has attempted to implement the procedures and found them so." 379 U.S. 650, 653. This same principal is applicable to the situation now before the Court. There is no legal or factual basis for presuming that the local union will not in good faith process a request by the Trustees to investigate and resolve the coverage issues. While it may be that the local union will determine that there is no coverage issue because Schneider fully performed as it had agreed under the terms of the collective bargaining agreement, this is what is contemplated by collective bargaining.[7] (*See, Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).)

The Seventh Circuit addressed this perceived problem in *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980). The court reasoned that:

> Lastly, the funds say they have no access to the arbitration process because Article 7 of the contract provides that arbitration may be invoked "only by the authorized Union representative or by the employer." The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and asks the Union, the organization of primary interest, to file a grievance against Martin.

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[7]The Court below correctly noted that the Schneider employees voted to decertify the local union in a National Labor Relations Board election in February of 1979. 700 F. 2d 433, 436 (Schneider Pet. App. A-23). The fear that this means there would be no basis upon which to resolve the coverage issue through the grievance and arbitration procedure is unfounded. *See, Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977).

Id., 625 F.2d 171, 173. A panel of the Eighth Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981), had previously noted that:

> [I]t would appear that in the event a dispute should arise respecting coverage, the duty of fair representation would impel the Union to invoke the grievance machinery if the Funds were to request such action.

641 F.2d 616, 618. As suggested by Judge Henley in his dissent in the decision below and as stated by Mr. Justice Harlan in *Republic Steel v. Maddox*, the courts should not presume a violation of the duty of fair representation.

> Rather, [the courts] should reject hypothetical and unlikely threats to the independence of the Trustees and require the parties first to resort to arbitration, where the law of the shop and the terms of the collective-bargaining agreements may best be interpreted. One need not be clairvoyant to forsee that the spirit of negotiation and compromise that forms the basis for such agreements might be seriously compromised if the parties become aware that the terms of the agreements might be safely ignored or interpreted initially other than through [sic] the arbitration machinery.

700 F. 2d 433, 444; (Schneider Pet. App. at A-41-A-42).

This Court has condemned other attempts to undermine the collective bargaining process and the principal of exclusivity by attempting to circumvent the elected representative. *Emporium and Western Addition Community Organization*, 420 U.S. 50 (1975).

With regard to the issue of whether contribution coverage disputes are amenable to resolution through the

grievance and arbitration procedure, courts, as well as arbitrators, have consistently found such disputes to be arbitrable.[8]

The coverage issue arises because of the imprecise wording in the collective bargaining agreement. See Appendix B which summarizes the haphazard manner of defining Schneider's obligations with respect to "fringe benefits" for its employees, depending on the status of their tenure. While it is clearly not the obligation of this Court to resolve the coverage issue, a review of the contract language reveals that this is an issue for an arbitrator, not a federal court. Among other things, while Sec. 1.2 purports to define "Employee" it, in fact, does

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[8]*Cf. Landy Packing Company v. Amalgamated Meatcutters and Food Handlers of North America, AFL-CIO, District Local 653-653-A,* 627 F. 2d 881 (8th Cir. 1980), *aff'g.* 471 F. Supp. 1218, (D.C. Minn. 1980) (involving enforcement of an arbitration award upholding the union's grievance claiming that the employer had failed to make contractually agreed upon contributions on account of work performed by "casual construction" employees, over the employer's contention that work performed by such employees was not covered by the obligation to contribute); *International Union of United Automobile, Aerospace and Agricultural Implement Workers of America v. F. Systems, Inc.,* 632 F. 2d 487 (5th Cir. 1980) (coverage issue of whether contract covered employees at reopened plant are to be submitted to arbitrator); *Columbian Carbon Co. v. International Union of Operating Engineers, Local Union No. 405, AFL-CIO,* 360 F. 2d 1018 (5th Cir. 1966) (grievances filed by union claiming back-pay for temporary construction workers held arbitrable over argument by employer that under the terms of the contract, they were not covered by the contract and were not entitled to any of the benefits of the contract); *Communication Workers of America v. United Telephone Company of Ohio,* not officially reported, 85 LRRM 2771 (N.D. Ohio 1973) (proper classification of employees under contract is arbitrable).

not do so. The agreement variously refers to employees on the basis of tenure as: "regular employees considered for hire on a permanent basis," "extra men," "daily additional temporary men," "extra men [needed for] temporary help,"[9] "employees" on a probationary basis "new employees," "regular employees," "extra employees," "new employees without work experience," "employees with work experience when referred by the union," "casual employees," "temporary employees," "part-time employees," "seasonal employees," and "employees who work temporarily or in cases of emergency." Incredibly, the agreement even refers to "each regular employee even though such employee may work only part-time. . . ." (Schneider Pet. App. A-63-65).

Of particular significance is the wording of the agreements relating to the obligation to contribute to the Funds —Articles XIII and XIV. (Schneider Pet. App. A-62-63, A-63-65). Article XIII, Section 13.5, says that "each regular employee" is covered by Schneider's obligation to contribute to the Health and Welfare Fund. If so, does that mean that all other categories are excluded? The affidavit of Marvin Schneider indicates that it is Schneider's understanding that this is the open and established practice in the industry. (J.A. 38). However, Sec. 13.5 goes on to say that Schneider is obligated to make contributions on behalf of regular employees even though they work only part-time. Then in Section 13.6, the agreement excludes from the obligation "employees who work either temporarily or in cases of emergency." Perhaps that is

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[9]Thus the idea of "extra" and "temporary" are confused.

clear enough by itself, but what about extras, casuals, and seasonals? Schneider employs only "regulars" and "casuals." (J. A. 38). Are casuals included in Schneider's obligation to contribute to the health and welfare fund?

Similar, if not more confusing language was used to frame Schneider's obligation to contribute to the Pension Fund. Article XIV begins by saying that the obligation exists for each "regular employee" and goes on to say that the obligation exists even though the employee works only part-time. The agreement then states that excluded from the obligation to contribute are "employees who work part-time, temporarily, or in cases of emergency or any employee who does not perform 25 hours of work in a week." (Schneider Pet. App. A-63-65). Add to this the industry practice of excluding all "casuals" from fringe benefit coverage and you have a textbook case of a need for an arbitrator who is familiar with the parties and the industry. The Trustees cannot seriously contend that unraveling the foregoing maze constitutes a "simple collection case."

Thus, it would be a gross understatement to say that the coverage issue involves a question of interpretation and construction of the agreement. It is, therefore, presumed to be arbitrable. *United States Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U. S. 574, 582-83 (1960).

Schneider and the union had contracted for an arbitrator's judgment as to the correct interpretation and construction of the collective bargaining agreement. Just as a federal court should not reject that judgment after it has been rendered if it draws its essence from the contract, a federal court should not prevent the arbitrator's

judgment from ever being rendered. However, this will be the result if the opinion of the Court below is permitted to stand. The Trustees will circumvent the contractual procedure by filing suit directly in federal court asking the court to render its own interpretation of the agreement. This is contrary to federal labor policy. *See, Warrior and Gulf,* 363 U. S. 574, 578.

In the *Steelworkers Trilogy,* this Court clearly stated its position. Where the parties have bargained for an arbitrator's interpretation of the terms of the collective bargaining agreement, their bargain is to be honored and the federal courts are not to become involved in preempting the arbitrator's judgment either before or after it is rendered. *Warrior and Gulf,* 363 U. S. 574, 598-599.

The danger of undermining federal labor policy by failing to require the Trustees to submit to the contractually bargained for grievance and arbitration procedures in cases such as this one are evident. Even the majority in the panel decision below recognized the risk that allowing the District Court to interpret the provisions of the collective bargaining agreement might lead to a lack of uniformity in interpreting the bargaining agreement. 700 F. 2d 433, 443, n. 9; (Schneider Pet. App. A-38, n. 9). Respecting the bargain of Schneider and the union and requiring that the coverage issue to be resolved through the contractual procedure preserves intact the policy of encouraging collective bargaining.

B. Trustees shall be independent of union and employer influence in the administration of Taft-Hartley multiemployer employee benefit trust funds.

While the complaint alleges jurisdiction under § 301 of the Labor Management Relations Act and § 502 of ERISA, and purports to be an action to enforce Schneid-

er's obligation to make contributions under the collective bargaining agreement, the Trustees have attempted to bootstrap themselves into a position to resolve the coverage issue by calling it a matter of fund administration. In doing so, the Trustees have confused their responsibilities as fiduciaries in the administration of the funds with the responsibilities of Schneider and the local union to discharge their obligation to collectively bargain and resolve their disputes in accordance with the contractually agreed upon grievance and arbitration procedure.

This Court has recognized and emphasized the strict fiduciary standards that trustees of Taft-Hartley funds must maintain in the administration of the funds The duties are implied in § 302(c) (5) and are expressly set forth in § 404(a) of ERISA. *See, NLRB v. Amax Coal Co.,* 453 U. S. 322, at 331-32; *UMWA Health & Retirement Funds v. Robinson,* 455 U. S. 562, at 570-1. However, the administration of multiemployer plans within the meaning of § 302(c)(5) and ERISA does not include the resolution of disputes arising under the language of the collective bargaining agreement as to who is covered by the employer's obligation is to make contributions. The reasoning of the Ninth Circuit in *Hawkins v. Bennett,* 704 F. 2d 1157 (9th Cir. 1983), is sound. As the court stated in a footnote:

> The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by 302(c) (5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure. The management appointed and union appointed trustees do not bargain with each other to set the terms of the

> employer-employee contract; *they can neither require employer contributions not required by the original collectively bargained contract nor compromise the claims of the union or the employer with regard to the latter's contributions* . . . . (emphasis added).

Hawkins v. Bennett, 704 F. 2d 1157, 1159 n. 1.

The Court below also suggested that the rights asserted by the Trustees in this matter are statutory administrative duties and are, therefore, not subject to the grievance and arbitration clause of the contract, citing *Barrentine v. Arkansas Best Freight System,* 450 U. S. 728 (1981). 700 F. 2d 433, 441; (Schneider Pet. App. A-34). While the court did cite § 515 of ERISA, 29 U. S. C. § 1145, and the legislative history behind that provision, it did not cite any statutory authority or legislative history for the proposition that the determination or resolution of coverage issues is a statutory obligation or right of the Trustees which is outside the scope of the grievance and arbitration procedure. That is because there is no such authority.

Further, the legislative history relied upon by the Court below actually supports Schneider's position—not the Trustees'—that coverage issues are to be handled under the grievance and arbitration procedure.

The legislative history cited by the Court below was:

> The provision which was eventually enacted as [Sec. 515] was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the provision was added because "simple collection actions brought by plan trustees had been converted into lengthy, costly and complex litigation concerning *claims and defenses unrelated to the employer's promise and the plans' entitlement to*

> *the contributions,"* and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S. 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong. 2d Sess., 44 (Comm. Print, Apr. 1980) (1980 Senate Labor Committee Print). (emphasis added.) During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of [§ 515] and the same language used in the Senate Labor Committee Print.

See, 700 F. 2d 433, 440; (Schneider Pet. App. A-31-32). The Court below went on to state that the reference to "simple collection actions" in the legislative history is striking in light of the use of the same phrase by the court in *Central States, Southeast, and Southwest Areas Pension Fund v. Howard Martin, Inc.,* 625 F. 2d 171 (7th Cir. 1980). However, *Howard Martin* was rendered after the legislative history was written. § 515 was not enacted in response to *Howard Martin.* In addition, it is clear that the arbitration procedure to be used in resolving coverage disputes is perfectly consistent with and supportive of § 515 of ERISA. By requiring that coverage disputes be subject to arbitration, the true collection actions would be just that—collection actions, and not long-winded and complex interpretations of collective bargaining agreements. By following the contractual provisions set forth, the coverage disputes would be resolved before any court would become involved. In fact, the reliance of the Court below on § 515 is totally incongruous with the rest of the decision. By allowing funds to litigate the coverage issues in court without exhaustion of the contractual arbitration procedure, the federal courts will be burdening themselves with

questions of contract interpretation—just the problem § 515 is intended to eliminate.

The Court below also quoted from *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U. S. 562, 571-2 (1982), to support its conclusion that the need to maintain the independence of the Trustees from the union requires allowing the Trustees to sue directly in federal court to litigate coverage issues. The reliance of the Court below on the dicta of *UMWA Health and Retirement Funds v. Robinson* is misplaced. The opinion simply recites the purpose behind the enactment of § 302(c)(5) and the necessity for independent *administration* of trust funds by equal numbers of employee and employer representatives. The holding of the Court in *UMWA v. Robinson* is diametrically opposite to the proposition for which the Court below cited the opinion.

The reliance of the Court below on *Rosen v. Hotel & Restaurant Employees*, 637 F. 2d 592 (3rd Cir. 1981), is also misplaced. *Rosen* simply begs the question of who should determine the threshhold coverage issue: the union and the employer under the contract, or the trustees in federal court? The quote by the Court below from the *Rosen* opinion leaves this question unresolved. Further, the *Rosen* opinion completely ignores the union as the exclusive bargaining representative. It is the union in the first instance which negotiates with the employer to establish which employees will be covered by the employer's obligation to contribute to the funds. If the union and the employer had agreed initially that Mr. Rosen was in a class of employees on whose account the employer was not to make any contributions, would Mr. Rosen have had a cause of action? He would not

have. *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953); *UMWA Health and Retirement Funds v. Robinson*, 455 U. S. 562 (1982). If he believed that the union had violated its duty of fair representation to him by failing to negotiate such contributions on his behalf, then his cause of action would have been against the union, and not against the fund which had no control over the union to dictate on whose behalf the union had to negotiate an obligation to contribute. If the logic of the Court below and the logic of the Third Circuit in *Rosen* is followed, are not the courts artificially creating a fiduciary obligation on the part of the trustees to police the conduct of the unions in enforcing what the trustees perceive the obligation to contribute to be.[10] The *Rosen* court went as far as to suggest that this includes the "obligation . . . to picket the non-contributing employer." 637 F. 2d 592, at 600. The opinion of the Court below and the opinion of the court in *Rosen* would seem to impose on trustees the obligation to compel the local union to force the employer to make contributions on behalf of all employees, to police the local union in enforcing that obligation, and to picket non-contributing employers. If this is so, then should this Court not also require that the trustees be seated at the bargaining table? Should they not be subject to a risk of the same economic harm under which employers and unions struggle and which is the catalyst for reaching a mutual accommodation?

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[10]The Court below referred to and recognized this emerging dilemma, which is created by allowing the Trustees to circumvent the union and the collective bargaining agreement by litigating coverage issues directly in federal court. 700 F. 2d 433, 441; (Schneider Pet. App. A-35).

If this is the case, then instead of preserving the independence of multiemployer trustees, there is a very real risk that they will become directly and immediately embroiled in the collective bargaining process and in the necessity for making trade-offs. This is exactly what the Court below fears will happen if the trustees are not allowed to litigate coverage issues.

In summary, if the Trustees are allowed to circumvent the dispute resolution procedure of the collective bargaining agreement by litigating coverage issues in federal court on the premise that matters of trust administration are involved, this will lead to their unnecessary involvement in the collective bargaining process. This is precisely what § 302(c) (5) and ERISA seek to avoid. Thus, the position of the Trustees and the opinion of the Court below may lead to the erosion of both of the federal policies which they argue support their position. The acceptance of the Trustees' position requires compromising both of the policies. On the other hand, the position taken by Schneider is consistent with both federal policies, allows each policy to support the other, and permits them to be applied in harmony.

II. As third party beneficiaries of the collective bargaining agreement, the Trustees' rights to receive contributions can be no greater than are provided in the agreement.

Taft-Hartley employee benefit funds are third-party beneficiaries of collectively-bargained obligations of employers to make contributions to the funds. *Lewis v. Benedict Coal,* 361 U. S. 459 (1960). It is fundamental that the rights of a third party beneficiary to a contract stem from the contract of which he is a beneficiary. *See,*

Rotermund v. United States Steel Corp., 474 F. 2d 1139 (8th Cir. 1973).

The promisor may, therefore, usually assert against the third-party beneficiary to the contract any defense which he could assert against the promisee if the promisee were suing on the contract. Unless some exception exists, the third-party beneficiary can be in no better position nor have more rights than are given to him in the contract. The rights of the Trustees to receive contributions from Schneider can be no greater than Schneider's obligation to contribute to the Funds as agreed to in the collective bargaining agreement.

This same principle relates to the Trustees' assertion that they may litigate questions of coverage under the collective bargaining agreement in federal court without awaiting resolution of coverage issues under the grievance and arbitration procedure. The Trustees as third-party beneficiaries must await a determination as to which employees are covered by the employer's obligation to contribute. Schneider and the union first attempted to do this when they negotiated the collective bargaining agreement. However, their efforts rather obviously failed, due—no doubt—in large part to their loose way of defining the obligation and defining the differences between regular employees, part-time employees, seasonal, extras, casuals, and temporary help (among others). (*See*, Appendix B.) Further, notwithstanding the wording of the contract, the practice in the industry is to cover only "regular" employees and not "casuals" for fringe benefits. How can the Trustees know if they are entitled to additional contributions until these issues are resolved? That is, the Trustees should be required to request that

the union, as the statutory bargaining representative of the employees, initiate the grievance and arbitration procedure to determine questions of coverage.

Of course, as the Court below recognized:

> Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case.

700 F. 2d 433, 442; (Schneider Pet. App. A-37). However, the Court below unfortunately stopped its analysis with the foregoing pronouncement. Had it analyzed the documents and tried to discern the true intentions of all of the parties, it would have reached an entirely different conclusion which is consistent with federal labor policy. Examination of the Trust Agreement,[11] on which the Trustees have relied so heavily to support their argument, reveals the following:

(1) It is an agreement between groups of Teamster unions and groups of employers. (J. A. 14).

(2) It is a trust fund for the purpose of accumulating and paying retirement benefits. (J. A. 15).

(3) The second recital of the premises of the trust agreement states:

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[11](J.A. 14).

> WHEREAS, the Union[12] and the Employer have heretofore entered into *collective bargaining agreements under the terms of which it is provided that the Employer shall contribute certain agreed-upon sums of money* therein set forth to a Pension fund . . . . (Emphasis added).

(J. A. 15).

(4) "Employee" is defined as someone employed under a collective bargaining agreement and "*on whose behalf payments are required by such collective bargaining agreement* or applicable law . . . ." (Emphasis added). (J. A. 16).

(5) The assets are derived from "Employer contributions made pursuant to the collective bargaining agreement between the parties. . . ." (J. A. 18).

(6) The Trustees require that:

> [e]ach Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties.

(J. A. 21).

(7) The Trustees have the power to demand and collect the contributions of the Employers to the Fund and [to file suit to collect] without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose. (J. A. 22).

(8) The Union will comply with any reasonable request of the Trustees to examine those records of the

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[12]In the preamble, "Union" is defined as the "CENTRAL CONFERENCE OF TEAMSTERS AND THE SOUTHERN CONFERENCE OF TEAMSTERS, and their affiliated *Local Unions*'. . . ." (emphasis added) (J.A. 14).

Union which may indicate the employment record of any Employee whose status is in dispute. (J. A. 23).

(9) The Trustees are protected from liability if they rely on documentation which is furnished to them. (J. A. 24 and 27).

(10) The Trustees may make rules to administer the trust, consistent with the collective bargaining agreements and the Trust Agreement. (J. A. 24).

(11) The Trustees may delegate certain matters to local unions. (J. A. 25).

(12) The Trustees may make rules allowing for accrual of benefits while employees are not actually working, i.e., disability, "but not contrary to applicable collective bargaining agreements." (J. A. 25).

(13) The Trustees have the power to construe the Trust Agreement and the Pension (or Health and Welfare Plan). (J. A. 26).

(14) When claims for benefits are filed, the Trustees may rely on documents filed by employers and local unions. (J. A. 27).

(15) Only "covered Employees" may be eligible for benefits. (J. A. 28).

It is clear, therefore, that the Trust is drawn with full recognition that the collective bargaining agreement is the basis of the Trustees' right to receive contributions. See items (3), (4), (5), (6), and (12) above. Those provisions all contain references to the controlling nature of the collective bargaining agreement. Thus, the trust

agreement truly reflects the status of the Trustees as third-party beneficiaries of the collective bargaining agreement.

The Trustees argue that *Lewis v. Benedict Coal Corp.*, 361 U. S. 459 (1960), creates a rule that they are uniquely situated third-party beneficiaries who are exempt from dispute resolution provisions in the collective bargaining agreement. In *Lewis,* the Court held that an employer could not set off against a third-party beneficiary welfare fund, a claim the employer had against the union. In reaching its decision, the Court observed that a welfare and retirement plan established under Section 302(c) of the Taft-Hartley Act was not a typical third-party beneficiary. *Lewis,* however, is clearly and significantly distinguishable. The distinction made by the Seventh Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.,* 625 F. 2d 171, 172 (7th Cir. 1980) is sound:

> In *Lewis,* however, the employer's liability for payments to the Fund was conceded, the case dealt with the employer's claimed right to withhold payments and setoffs of damages, and no arbitration clause was present in the contract or discussed by the Court. Whether the Funds' special third party status would require a specific provision entitling an employer to set off payments admittedly owed is irrelevant here, where the existence of the obligation to make certain payments depends on the interpretation of the contract and the contract specifically requires arbitration on questions of interpretation.

The Court below concluded that: "[*Lewis*] is recognized as establishing an exception to the general rule that defenses good against the promisee are good against the donee beneficiary such as the Funds." 700 F. 2d 433, 437;

(Schneider's Pet. App. A-25). The fact that Lewis may have created an exception has no application here. Schneider does not seek a setoff based on a claim against the union. Schneider simply asserts that the terms of the collective bargaining agreement set forth a specific procedure for the resolution of disputes, such as this coverage dispute, and that this procedure should be followed.

In addition, *Lewis* has no application here since *Lewis* created no exception to the rule that a third-party beneficiary can assert no right greater than the rights given to the beneficiary under the contract. The Trustees are seeking to assert a right in this case which is greater than the right granted to them by the union or Schneider in the collective bargaining agreement.

Just last term, this Court took the opportunity to limit *Lewis* to its facts in *Kaiser Steel Corp. v. Mullins*, 455 U. S. 72 (1982). Like the Trustees in the case before the Court, the respondents in *Kaiser* argued that § 515 of ERISA established a special rule regarding the availability of defenses to employers in actions brought by employee benefit fund trustees for delinquent contributions. 455 U. S. 72, 86-88. The Court held that assuming *arguendo* that § 515 applies, it carries with it a requirement that it may only be enforced to the extent not "inconsistent with law." Section 515 also provides that employers shall make contributions "in accordance with the terms and conditions of such plan or such [collectively bargained agreement]." Thus, § 515 recognizes what in fact must be true. Enforcement actions for allegedly delinquent contributions must be based on the terms of the collective bargaining agreement and can be no greater than are provided in the agreement. Therefore, the Trustees, as third-party beneficiaries, must await a reso-

lution of the coverage issue under the terms of the collective bargaining agreement.

Further, the Court concluded in *Kaiser* that the purpose of § 515 was not to prevent employers from raising any and all defenses; "rather they spoke in terms of 'unrelated' and 'extraneous' defenses." The defense raised by Schneider here is not "unrelated" or "extraneous." The determination of the coverage issue is directly related to the question of Schneider's obligation. Therefore, the defense that this matter must first be subjected to the grievance and arbitration procedure under the collective bargaining agreement is a proper defense to present against the Trustees as third-party beneficiaries of the collective bargaining agreement.

The Trustees assert that they have a right and obligation to litigate questions of coverage involving interpretation of the collective bargaining agreement in federal court without resort to arbitration. Where did this right originate? Neither Schneider nor the union has such a right under the collective bargaining agreement. Section 515 of ERISA does not give them that right. The artificial creation of such a right for a third-party beneficiary Taft-Hartley fund would clearly undermine the federal labor policy favoring collective bargaining; would be contrary to the intent of the Central States trust agreements that their right to receive contributions is determined by the terms of the collective bargaining agreements; would serve no purpose since the contractual dispute resolution methods are available; and would not further any duties owed by the Trustees to the participants or beneficiaries since such duties would be discharged by a resort to the grievance and arbitration procedure under the contract.

III. The majority of the Courts of Appeals that have reviewed this issue have concluded that coverage issues must first be submitted to the grievance and arbitration procedure under the terms of the collective bargaining agreement.

The majority of the courts of appeals that have considered the issue have ruled that where an interpretation or construction of the contract language is required in order to determine which employees are covered by the obligations to contribute, the issue must first be submitted to the grievance and arbitration procedure under the collective bargaining agreement. On the other hand, most of the same courts have concluded that where the action instituted by the trustees of funds is a mere collection action to recover delinquent contributions, the trustees may institute such collection actions in federal court.

A. Circuits approving deferral requirement: Fourth, Sixth, Seventh and Ninth.

The Seventh Circuit Court of Appeals was the first court of appeals to rule on the issue. In *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F. 2d 171 (7th Cir. 1980), the language contained in the collective bargaining agreement was nearly identical to the language in this case. There, as here, the same Trustees filed a collection suit against the employer seeking contributions claimed to be owed under the terms of the collective bargaining agreement. The employer moved to dismiss, alleging absence of subject matter jurisdiction, because the arbitration provisions contained in the collective bargaining agreement had not

been exhausted. The District Court granted the motion to dismiss and the Seventh Circuit Court of Appeals affirmed, reasoning that:

> We agree with the funds, as does Martin, that the funds are not required to arbitrate disputes over delinquent payments. However, [District] Judge Nolan was correct in finding that this is not a simple collection case, but a case turning on which, if any, of the disputed workers were covered by the contract. Until that question is resolved, it is impossible to determine whether there is any delinquency on which to base a collection action under Articles 60 and 61. The parties to the contract clearly intended, as reflected in their inclusion of Article 8, that such questions of contract interpretation be resolved by arbitration.

625 F. 2d 171, 172. The same Trustees argued in *Howard Martin*, as here, that they had no access to the arbitration process. The Court answered that:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain worker, and ask the Union, the organization of primary interest, to file a grievance against Martin (footnote omitted.)

625 F. 2d 171, 173.

This same issue was recently addressed by the Fourth Circuit Court of Appeals in *Trustees of National Benefit Fund for Hospital and Health Care Employees v. Constant Care Community Health Center*, 669 F. 2d 213 (4th Cir. 1982). The Court of Appeals reversed the district court's dismissal of the Fund's complaint. The Court approved and adopted the reasoning of *Howard Martin*, but ruled that the case before it was a simple collection

case to which no substantive defenses had been asserted by the employer. The Court, approving *Howard Martin*, stated that where the case involves a dispute arising out of an interpretation of the contract, and the contract calls for arbitration of such disputes, the case must first be submitted to arbitration.

The Court went on to hold that:

> As the quoted passage from *Howard Martin* discloses, the rationale of that decision was that the case was not a simple collection matter; rather, it was an underlying question of contractual interpretation warranting arbitration which was a prerequisite to collection.

The Ninth Circuit Court of Appeals recently rendered a decision on this same issue in *Laborers Health and Welfare Trust Fund v. Kaufman & Broad of Northern California, Inc.*, 707 F. 2d 412 (9th Cir. 1983).

In *Kaufman & Broad*, the Fund sued the employer as the result of the employer's failure to make contributions on behalf of non-union workers doing "callback" work. The employer claimed that "callback" work was not covered under the collective bargaining agreement and that it was not required to make contributions on behalf of the employees doing such work. The employer removed the case to federal court and moved for summary judgment.

The district court granted summary judgment in favor of the employer finding that there was no genuine question of fact as to whether or not "callback" work was covered under the collective bargaining agreement. Adopting a position that is ironically diametrically opposed to the position of the Trustees here, the Fund argued on appeal that the district court should have stayed the pro-

ceedings pending the outcome of arbitration of the coverage issue pursuant to the collective bargaining agreement.

The Ninth Circuit, taking somewhat of a different approach from cases decided to date on this issue, found that the funds were subject to the arbitration clause of the collective bargaining agreement but that they had waived their right to invoke the use of the arbitration process. The Court stated:

> That the Funds are third party beneficiaries rather than parties to the collective bargaining agreement does not alter our view of the waiver issue. As the Funds point out in their own brief, third party beneficiary trust funds, like the parties to a labor contract, may be required to arbitrate issues properly governed by the arbitration provisions of a collective bargaining agreement. *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F. 2d 171 (7th Cir. 1980). Moreover, where the trust funds are the aggrieved party, they may be required to trigger the arbitration process by informing the Union of an arbitrable dispute. *Id.* at 172. They both stand in the same position with respect to arbitration as parties to the collective bargaining agreement, and are thus subject to the waiver doctrine.

707 F. 2d 412, 417.

The *Kaufman & Broad* court then went on to state that since there was a waiver and since the employer did not in this case wish to compel arbitration, the district court could properly assume jurisdiction. The trust fund was held to have waived its right to arbitration and the employer chose to assert the waiver as a defense. This decision is consistent with the *Howard Martin* reasoning and the reasoning of the District Court below in this case that

arbitration of covered issues may be required where arbitration is properly raised.

However, the Ninth Circuit deviated from sound reasoning in one respect. The Court erred in ruling that the district court could properly assume jurisdiction over the coverage question. It should have ruled that the coverage question had been resolved against the Funds by waiver. In other words, it does not contravene federal labor policy to hold that if an issue is not raised in timely fashion, it is barred.

In *Central States, Southeast and Southwest Areas Pension Fund, et al v. Central Transport, Inc., et al.*, 698 F. 2d 802 (6th Cir. 1983), *pet. for cert. filed,* the same Trustees who are the Respondents here brought suit seeking a preliminary injunction to require the employer to provide the Funds with certain information with respect to all employees of the employer. The Sixth Circuit held that neither ERISA's statutory disclosure provisions nor any contractual provisions entitled the Funds to conduct such a broad inspection of records. The Court held that there was a limited right to inspect employee records, which was limited to "factual situations in which the Trustees had reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been placed on the union's seniority list or otherwise classified by [the employer] or the Union as a covered employee." 698 F. 2d 802, 811.

The Court described the means by which the covered or non-covered status of a group of employees was to be determined. The Court said:

> Entitlement to funds' benefits may be established by a concession among the parties that a particular

> individual is a covered employee or person otherwise entitled to the funds' benefits. Entitlement may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee.

698 F. 2d 802, 811.

The clear holding of the Sixth Circuit is that where the collective bargaining agreement dictates the method of determining coverage, that method must be followed in order to determine whether a particular employee or group of employees is in fact "covered." The import of the Sixth Circuit's decision is that the Trustees, as third-party beneficiaries, are bound by the terms of the collective bargaining agreement.

B. Circuits ruling that the Trustees may litigate coverage issues: Fifth and Eighth.

In another recent case, the Fifth Circuit Court of Appeals tangentially considered the issue before the Court. In *Bugher v. Consolidated X-Ray Service Corporation,* 705 F. 2d 1426 (5th Cir. 1983), both the trustees of the pension fund and the union sued for delinquent amounts allegedly owed under the terms of the collective bargaining agreement. The employer raised the defense that the trustees and the union had failed to arbitrate the issue, citing *Howard Martin* in support of their position. The trustees and the union appeared to have waived the right to arbitrate by failing to timely exercise this right. The Court distinguished the case from *Howard Martin* stating that in *Bugher* the collective bargaining agreement only required arbitration "between the parties." The Fifth Circuit, obviously searching for a method of resolving the coverage question, held that since the

collective bargaining agreement only required invocation of the grievance and arbitration procedure "between the parties," the trustees were not bound by that procedure. The Fifth Circuit went on to say that the trust agreement in that case authorized the trustees to go directly to court to pursue delinquent employer contributions. However, the court ignored the fact that the trust agreement only permitted the trustees to go to court to collect contributions to which they were entitled and which were in fact delinquent. Nowhere did the trust agreement authorize the trustees to go to court to litigate questions of coverage under the collective bargaining agreement. The Fifth Circuit, by distinguishing *Howard Martin* completely missed the point of *Howard Martin*. While it was true that the trustees were not included in the arbitration provision of the collective bargaining agreement, that did not prevent the trustees from calling on the union to process the issue.

The Fifth Circuit also concluded that the *union* was not bound by the grievance and arbitration provisions of the collective bargaining agreement because it had the right to strike over allegedly delinquent contributions. Similarly, in the case before the Court, the collective bargaining agreement reserves to the union the right to strike or to go to arbitration over a grievance. (Schneider Pet. App. A-32). Contrary to the reasoning of the Fifth Circuit, it is submitted that this fact further establishes that Schneider and the union intended that coverage issues, like other interpretation issues, should be resolved under the terms of the collective bargaining agreement, whether by arbitration or strike. 705 F. 2d 1426, 1433-34.

The Fifth Circuit thus avoided the issue and also concluded that the union itself might go directly to fed-

eral court and litigate the coverage question. As can be seen, the Fifth Circuit is clearly at odds with the federal labor policy favoring arbitration. Unfortunately, it appears that the court did this to achieve the result it thought should have been reached. The fact that the trustees and the union in the *Bugher* case had waived the grievance and arbitration provisions of the contract should have concluded the case. Instead, the Fifth Circuit felt compelled to go clearly against precedent and the federal labor policy favoring arbitration in order to reach its result. In reaching its decision, the Fifth Circuit also felt compelled in dicta to adopt the reasoning of the Eighth Circuit Court of Appeals in the case below.

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C. SUMMARY

Thus, except for the Eighth Circuit below and the dicta contained in *Bugher v. Consolidated X-Ray Service Corporation, supra,* all of the circuit courts of appeals which have considered the coverage resolution issue have ruled that where there is a genuine dispute involving the interpretation of the terms of the collective bargaining agreement, such a dispute must be resolved through the contractual grievance and arbitration procedure prior to any action to collect such contributions. The rationale of the decisions so holding was that no right of collection can be determined by a court contrary to the terms of the document that created the right. Until the question of coverage under the collective bargaining agreement is resolved, it is impossible to make a determination as to whether or not there is a delinquency which will support

a collection action. The courts correctly recognize that where the existence of the obligation to make certain payments depends upon the interpretation of the collective bargaining agreement and the collective bargaining agreement specifically requires arbitration on questions of interpretation, the court must defer to arbitration.

CONCLUSION

For the foreging reasons, the Court of Appeals decision should be reversed, and the order of the District Court dismissing the complaint should be affirmed.

Respectfully Submitted,

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APPENDIX A

STATUTES INVOLVED

Act of July 5, 1935, 49 Stat. 453, as amended by Act of June 23, 1947, 61 Stat. 143, as amended, Section 9, 29 U. S. C. § 159.

Representatives and elections

(a) Exclusive representatives—Employees' adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Act of June 23, 1947, 61 Stat. 157, as amended, Section 302, 29 U. S. C. § 186.

Restrictions of payments to employee representatives

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator

of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 USCS §§ 301-327]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and em-

ployees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of employees may agree upon and in the event the employer and the employers and the representatives of employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities. . . .

Act of Sept. 2, 1974, 88 Stat. 877, as amended by Act of Sept. 26, 1980, 94 Stat. 1296, Section 404(a), 29 U.S.C. § 1104(a).

Fiduciary duties

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d) [29 U. S. C. § 1103(c) and (d)], 4042 [29 U. S. C. § 1342], and 4044 [29 U. S. C. § 1344],

a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

Act of Sept. 26, 1980, 94 Stat. 1295, Section 515, 29 U. S. C. § 1145.

Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

APPENDIX B

SUMMARY OF COLLECTIVE BARGAINING AGREEMENTS PROVISIONS

(1) CONTRACT SECTION AND APPENDIX REFERENCES	(2) SUBJECT	(3) TENURE STATUS OF EMPLOYEE MENTIONED IN CONNECTION WITH BENEFIT
Sec. 1.2 (Schneider Pet. App. A-45).	Definition of "Employee"	Inclusion in collective bargaining unit
Sec. 2.1(A) (Schneider Pet. App. A-46).	Union referrals	"Regular employees considered for hire on a permanent basis"
		"Extra men" needed for "daily additional manpower."
		"Daily additional temporary men"
		"Extra men" needed for "temporary help"
Sec. 4.1 (Schneider Pet. App. A-49).	Seniority and layoff	"Regular employees who have been employed for a period of sixty (60) days or more"
Sec. 4.2 (Schneider Pet. App. A-49).	Probationary employment; seniority	"An employee, new to the company who otherwise qualifies, shall be considered on a trial basis for a period of no longer than sixty (60) calendar days"
	"all fringe benefits"	"A new employee" . . . "after one hundred twenty (120) days

		following the first date of his employment unless he had been immediately previously employed and covered as a regular in industry"
	Vacation benefits	"An employee shall qualify . . . as outlined in Article XV [Vacations]."
	Holidays	"New employees" . . . "after sixty (60) days of employment"
Sec. 4.4 (Schneider Pet. App. A-50).	Roster Posting in order of date of employment	"Regular employees"
Sec. 10.1 (Schneider Pet. App. A-54).	Standards of conduct	"All employees"
Sec. 10.2 (Schneider Pet. App. A-55).	Warnings and Discharge	"Any employee"
Sec. 10.3 (Schneider Pet. App. A-55).	Time limit for filing grievance for discharge	"Any employee"
Sec. 11.2 (Schneider Pet. App. A-56).	Call-in time; 6 hours pay	"Employees"
	Call-in time; time of calculating	"Extra employees"
Sec. 11.3 (Schneider Pet. App. A-56).	Pay periods; Friday payday	"Regular employees"
	Pay periods; payable on completion of work	"Extra employees"
	Itemized statement	"All employees"

Sec. 11.7 (Schneider Pet. App. A-58-59).	Travel allowance	"All employees"
Sec. 11.8 (Schneider Pet. App. A-59).	Holidays	"Regular employees"
Sec. 12.1 (Schneider Pet. App. A-60).	Straight time Hourly rates	"Employees"
Sec. 12.2; Schneider Pet. App. A-61).	$.80 per hour below scale wage rate	"New employee without previous experience in the moving industry in St. Louis"
	Wage rate	Employee with work experience when referred by the union.
	$1.50 per hour wage rate below helpers rate	"Casual, temporary, or part-time employees, exclusive of employees who regularly report to the union employment office"
	Definition	"A casual or temporary employee is one who, hired for the day, and without promise of continued employment, is terminated upon the completion of the day."
	Definition	"A part-time employee is one who normally has a regular job elsewhere."
	Wage rate of $1.50 per hour less than the helpers rate	"Seasonal employee"

	Union security	"Seasonal employees"
Sec. 13.1 (Schneider Pet. App. A-62).	Contributions to Central States, Southeast and Southwest Areas Health and Welfare Fund	"Each employee covered by this agreement who has been on the payroll sixty (60) days or more, after completing his probationary period as provided for in Section 4.2"
Sec. 13.5 (Schneider Pet. App. A-63).	Employees covered by employer's obligation to make contributions to Health and Welfare Fund	"Each regular employee, even though such employee may work only part time . . . including weeks where work is performed for the employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other health and welfare fund."
Sec. 13.6 (Schneider Pet. App. A-63).	Employees excluded from Welfare Fund coverage contribution obligation	"Employees who work either temporarily or in cases of emergency"
Sec. 13.6 (Schneider Pet. App. A-63).	Weekly disability Supplement	"Employee . . . found by the Workmen's Compensation Commission to be eligible for compensation under the law."
Art. XIV (Schneider Pet. App. A-63-65).	Pensions	"Each regular Employee . . . who has been on the payroll for sixty (60) days or more after becoming a regular employee."

	Employees covered by employer's obligation to make contributions to Pension Fund	"Each regular employee even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the employer but not under the provisions of this contract, and although contributions may be made to the Pension Fund"
	Employees excluded from pension fund coverage contribution obligation	"Employees who work part-time, temporarily, or in cases of emergency, under the terms of this contract . . .; and . . . any employee who does not perform 25 hours of work in any week."
	Minimum pension contribution of 35 weeks per year	"Each regular employee"
Sec. 15.1 (Schneider Pet. App. A-65).	Vacations	"Any employee employed [for certain lengths of time] by the same company"
	Minimum service required for vacation	"Employee" who "has worked a total of 1200 hours for one company in the year immediately preceding the date of his eligibility for such vacation."

Sec. 18.1 (Schneider Pet. App. A-67).	Prescripticare	"Each employee covered by this agreement who has been on the payroll thirty (30) days or more."
Sec. 18.5 (Schneider Pet. App. A-68).	Coverage	"Each regular employee, even though such employee may work only part-time under the provisions of this contract, and although contributions may be made for those months where work is performed for the Employer but not under the provisions of this Contract, and although contributions may be made for those months into some other fund."
	Exclusion from coverage	"Employees who work either temporarily or in cases of emergency under the terms of this contract"
Sec. 20.8 (Schneider Pet. App. A-70).	Transfer from company to company; consent required	"Employee . . . provided all regular employees of the company receiving the transferred employees are working"
Art. XXIII (Schneider Pet. App. A-73).	Funeral leave	"An employee"
Art. XXIV (Schneider Pet. App. A-73).	Jury duty leave	"Regular employees"

The references in the three collective bargaining agreements attached to the Respondents' Complaint as Exhibits 1 and 2, read substantially the same as those parts of Exhibit 3 summarized above, except for Section 12.2 of Exhibit 1—the 1970 to 1973 Agreement—and Exhibit 2—the 1973 to 1976 Agreement. Section 12.2 of the 1973 to 1976 Agreement is set forth in the Joint Appendix at page 12, and the 1970 to 1973 Agreement is set forth in the Joint Appendix at page 13. Those references to classes of employees based on tenure are as follows:

(1) CONTRACT SECTION AND JOINT APPENDIX REFERENCES	(2) SUBJECT	(3) TENURE STATUS OF EMPLOYEE MENTIONED IN CONNECTION WITH BENEFIT
Excerpt from Plaintiff's Exhibit 2, Attached to Plaintiff's Complaint Against Schneider—Section 12.2 of Collective Bargaining Agreement Effective March 1, 1973, to February 28, 1976		
Sec. 12.2 (J.A. 12).	$.80 per hour below scale wage rate	"A new employee without previous experience in the moving industry in St. Louis"
	Regular wage rate	"An employee with work experience with companies which are members of this Association, when referred by the Union, shall be paid at the rate stated for his class."
	Rate of $2.50	"Casual, temporary, or part-time employees, exclusive of employees who

	regularly report to union employment office"
Definition	"A casual or temporary employee is one, who hired for the day, and without promise of continued employment, is terminated upon the completion of the day."
Definition	"A part-time employee is one who normally has a regular job elsewhere."
Wage rate	"A seasonal employee may be hired at the rate of $2.50 per hour for his first season with the Industry, $2.75 per hour for his second season with the Industry, $3.00 an hour for his third season with the Industry, and $3.25 an hour for his fourth season with the Industry."
Definition	"A seasonal employee is one, such as a student, who is hired for a seasonal period customarily between May 15 and September 15.

	Union security; continued employment	"Thirty-one days following employment a seasonal employee"

Excerpt from Plaintiff's Exhibit 1, Attached to Plaintiff's Complaint against Schneider—Section 12.2 of the Collective Bargaining Agreement Effective March 1, 1970, to February 28, 1973

Sec. 12.2 (J.A. 13).	Wage rate $.80 per hour less than scale	"A new employee without previous experience in the Moving Industry in St. Louis"
	Rate of $2.00 per hour	"Casual, Temporary, Seasonal, or part-time employees"
	Definition	"A casual or temporary employee is one who, hired for the day, and without promise of continued employment, is terminated upon completion of the day."
	Definition	"A seasonal employee is one, such as a student, who is hired for a seasonal period customarily between May 15 and September 15.
	Definition	"A part-time worker is one who normally has a regular job elsewhere."
	Wage rate	"An employee with work experience with

	companies which are members of this Association, when referred by the Union."
Union security; continued employment	"A seasonal employee" within thirty-one days following employment"